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Nos. 05-908, 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Ninth Circuits

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BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS, MAGNET SCHOOLS OF AMERICA, PUBLIC EDUCATION NETWORK, UNITED STATES CONFERENCE OF MAYORS, AND SAN FRANCISCO UNIFIED SCHOOL DISTRICT AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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The Council of the Great City Schools, Magnet Schools of America, Public Education Network, United States Conference of Mayors, and San Francisco Unified School District respectfully submit this brief amici curiae in support of respondents in these cases.[1]

INTEREST OF AMICI CURIAE

Amici and their members are school districts and national organizations that are deeply committed to providing high quality and equal educational opportunities for all of the nation's schoolchildren. Amici and their members are committed to preserving for their members the flexibility to make race-conscious student assignment policies to maintain racially diverse student bodies.[2]

SUMMARY OF ARGUMENT

I. The question in this case is whether school districts may take some modest account of race when they make the necessary assignments of students to schools – or whether, conversely, they are constitutionally required to operate their school systems in a way that reflects racial segregation patterns and the societal inequalities that produce them. Unless schools may take some account of race in student assignments, the residential segregation present in most school districts would result in substantial racial segregation in the school systems, and the emergence or entrenchment of racially isolated schools.

School districts have a compelling interest in promoting racially integrated schools for two independent reasons. First,

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[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than amici, their members, or their counsel contributed monetarily to the brief.

[2] Each of the amici, as well as the 66 school districts represented by the Council of the Great City Schools (including the two now before the Court), are identified and described individually in the attached appendix.

as all three branches of the federal government recognize, assuring equal educational opportunities to all children, regardless of race, is a national priority. That goal cannot be achieved if school districts are left powerless to address racial segregation and isolation in their schools. Only by taking on racial isolation can school districts fully close the "racial achievement gap" – the gap between minority and white educational opportunity and attainment. Second, a critical part of the mission of public schools is to train students as citizens of a multi-cultural democracy. The available social-science data amply confirms the common-sense proposition that this mission is best accomplished by allowing students of different races to learn together and from each other.

II. The means chosen by the respondent school districts to achieve this compelling interest are narrowly tailored. Where race itself is at the crux of the compelling interest at stake, it may permissibly be taken into account by school districts in developing student assignment policies. The districts need not seek out inexact proxies for race, or explore other race-neutral programs, because these options do not offer a workable alternative capable of achieving the districts' interests.

ARGUMENT

I. ALL SCHOOL DISTRICTS HAVE A COMPELLING INTEREST IN RACIALLY INTEGRATED SCHOOLS.

Petitioners and the United States concede, as they must, that one set of school districts has a compelling interest in racial integration: districts that in the past engaged in de jure segregation and have yet to remedy the constitutional violation. But that, according to petitioners and the United States, is where the compelling interest ends. School districts never judged guilty of de jure segregation (like Seattle) have no compelling interest in avoiding racial segregation in their systems. And even school districts (like Jefferson County)

that in the past were found to have engaged in de jure segregation, and as a result were constitutionally *required* to implement race-conscious remedial action *just like the integration programs at issue here*, are without any compelling interest in maintaining desegregated systems from the moment court orders are lifted. On that view, the vast majority of school districts are constitutionally prohibited from taking race into account in any degree, even when necessary to avoid de facto school segregation that mirrors residential segregation. Simply put, should petitioners prevail, such school districts would be constitutionally *obliged* to operate segregated school systems.

That position is incorrect. As we show below, *all* school districts, whether or not guilty of de jure segregation in the past, have a compelling interest in racially integrating their schools in the present, and in avoiding racially isolated schools that otherwise would emerge.

A. All Branches Of The Federal Government Have Recognized The Importance Of Equalizing Educational Opportunities For All Students.

From *Brown v. Board of Education* to the No Child Left Behind Act, the judicial, legislative, and executive branches of the federal government have demonstrated full and perhaps unparalleled agreement on one crucial point: that children of all races are entitled to equal educational opportunities. This Court's decision in *Brown* provided only the starting point for the joint effort to make that promise a reality. In subsequent decisions, running from *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), to *Grutter v. Bollinger*, 539 U.S. 982 (2003), the Court reaffirmed both its commitment to racial equality in the educational context and the importance of racial integration in the nation's schools. And working in tandem with the Court, the legislative and executive branches have continued the effort to remedy persistent inequalities in the educational opportunities afforded

racial minorities, along with the consequent gap in educational achievement among minority children.

From the beginning of his presidency until even after the United States filed its briefs in these cases, President George W. Bush made this issue a centerpiece of his domestic agenda, with frequent and repeated emphasis on the racial achievement gap – or, as it has been more colorfully described by the Bush administration, "de facto educational apartheid," *see* Dr. Rod Paige, U.S. Sec'y of Educ., Remarks at the Kennedy Sch. of Gov't, "Fifty Years After *Brown v. Board of Education*: What Has Been Accomplished and What Remains to Be Done?" (Apr. 22, 2004) [hereinafter "Paige Remarks"]. For example, just days after first taking office in 2001, President Bush made a point of noting that "the academic achievement gap between . . . Anglo and minority [students] is not only wide, but in some cases is growing wider still." Pres. George W. Bush's Education Blueprint "No Child Left Behind" (released Jan. 23, 2001). Since then, he has frequently referenced this racial "achievement gap" and the necessity of eliminating it. *E.g.*, Pres. Bush, Remarks to the Nat'l Urban League Conference, 39 Weekly Comp. Pres. Doc. 984, 987 (July 28, 2003) ("Equal education is one of the most pressing civil rights of our day. Nearly half a century after *Brown* . . ., there's still an achievement gap in America."). The President's dedication to this issue has been consistent throughout his term, remaining evident even in very recent remarks. *See, e.g.*, Pres. Bush, Speech at Woodridge Elementary and Middle Campus, __ Weekly Comp. Pres. Doc. __ (Oct. 5, 2006) (forthcoming), *available at* http://www.whitehouse.gov/news/releases/2006/10/20061005-6.html ("There's an achievement gap in America that's not good for the future of this country.").

Moreover, President Bush's commitment to eradicating the "soft bigotry of low expectations," 39 Weekly Comp. Pres. Doc. at 987, has extended – expressly so – to the use of race-conscious means to address the achievement gap. *E.g.*, Pres.

Bush, Remarks in a Discussion at the Nat'l Inst. of Health, 40 Weekly Comp. Pres. Doc. 870, 874 (May 12, 2004) ("[A]s part of the new accountability system, the No Child Left Behind Act, we break out based upon race. It's really essential we do that. It's really important. If you don't do that, you're likely to leave people behind. And that's not right. There's . . . an achievement gap in America that will be closed. It must be closed, and will be closed. It won't be closed unless you're honest about the achievement gap, unless you're able to see clearly who needs help . . . ."); Pres. Bush, Remarks at Hyde Park Elementary Sch., 39 Weekly Comp. Pres. Doc. 1178, 1181 (Sept. 9, 2003) ("we want to know . . . whether or not the African American students are learning").

The No Child Left Behind Act ("NCLBA" or the "Act") is the cornerstone of this Administration's commitment to eliminating the racial achievement gap. The Administration understands and promotes the Act as a continuation of the *Brown* legacy. *See, e.g.*, Paige Remarks, *supra* (noting "such [racial] division [in schools] was wrong in 1954, and it is wrong today" and crediting Pres. Bush with his attempts to remedy it through measures such as the NCLBA).

Likewise, the Congress that enacted the NCLBA was also cognizant of the racial achievement gap and the need to close it. *See, e.g.*, 147 Cong. Rec. H10082, H10103 (Dec. 13, 2001) (statement of Rep. Miller) ("My colleagues said they wanted accountability for closing the achievement gap, and we have provided that. . . . We believe that because an individual is a minority does not mean they cannot learn. And the evidence is overwhelming that we are right."); 147 Cong. Rec. S3774, S3775 (Apr. 23, 2001) (statement of Sen. Gregg) (discussing reasons why "[w]e are going to say for different ethnic groups, different racial groups . . . explain whether or not those kids are learning"); 147 Cong. Rec. S4125, S4133 (May 2, 2001) (statement of Sen. Frist) ("We have all talked a lot about the achievement gap which has not narrowed but in

fact gotten wider over time . . . ."); 147 Cong. Rec. S13322, S13324 (Dec. 17, 2001) (statement of Sen. Kennedy) ("One of the major goals [of the NCLBA] . . . is to lessen . . . the educational achievement gap between . . . minority and non-minority students.").

Not only does the statutory purpose of the Act mirror the floor statements of the Education Committee leaders of the House and Senate quoted above, *see* 20 U.S.C. § 6301(3) (purpose of Act is, *inter alia*, to "clos[e] the achievement gap between . . . minority and nonminority students"), but the Act itself expressly requires race-conscious measures. The Act mandates that each State's plan include, *inter alia*, "separate measurable annual objectives for continuous and substantial improvement for . . . [t]he achievement of . . . students from major racial and ethnic groups." *Id.* § 6311(b)(2)(C)(v)(II)(bb). Moreover, the Act requires that student test results are disaggregated by race at both the school and district levels in order to be quantified against the annual objectives of each state's plan. *See* 20 U.S.C. § 6311(b)(3)(C)(xiii). School officials are then responsible for increasing the academic achievement of these racially-identifiable groups of students. *See id* §§ 6311(b)(2)(B), 6311(b)(2)(C)(v)(II)(bb).[3]

Congress and the Executive also have enacted and enforced other programs that call for race-conscious education policies. The Magnet Schools Assistance Program ("MSAP"), for example, recognizes that "[i]t is in the best interests of the

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[3] Furthermore, individual schools and districts are subject to severe and costly sanctions to the extent their racial subgroups of students fail to meet the state-established academic proficiency objectives. *See, e.g.*, 20 U.S.C. § 6311(g)(2) (loss of federal funding). Indeed, the failure to meet these requirements for racial subgroups is of such compelling import that it can result in extremely harsh consequences including the dissolution of the school or the abolishment of the district as a unit of local government. *See id.* §§ 6316(b)(7)(C)(iv), (8)(B); *id.* §§ 6316(c)(7)(A), (10)(C).

United States to continue the Federal Government's support of local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stages of such students' education." 20 U.S.C. § 7231(a)(4)(A). Congress, furthermore, was explicit in its intentions for MSAP: "to assist in the desegregation of schools . . . by providing financial assistance to eligible local educational agencies for . . . the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools." *Id.* § 7231(b)(1). The executive branch implemented MSAP in accordance with this view of the necessity of race-consciousness – at least, up until the day it filed its briefs in these cases[4] – relying on selection criteria that include such factors as "the effectiveness of [a school's MSAP] plan to recruit students from different social, economic, ethnic, and racial backgrounds into the magnet school," 34 C.F.R. § 280.31(a)(v), and whether a program "improve[s] the racial balance of students in the applicant's schools by reducing, eliminating, or preventing minority group isolation in its schools," *id.* § 280.31(c)(2)(v).

The racial "achievement gap" that the NCLBA and MSAP were designed to address is real. Nationwide, 39% of white 8th graders in 2005 scored at or above "proficient" on the reading portion of the National Assessment of Educational Progress (NAEP), compared with only 12% of African

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[4] On the same day the Solicitor General filed its briefs in these cases, the Department of Education announced a Notice of Proposed Rulemaking, 71 Fed. Reg. 48866 (Aug. 22, 2006), which would change the MSAP selection criteria, presumably to override the current, and longstanding, practice of favoring and approving race-conscious programs with goals similar to those at issue in these cases. The President has made no clear declaration of the radical policy shift suggested by the Justice and Education Departments' same-day filings, but it is at least much less clear today that the Administration supports programs designed to help remedy the racial achievement gap.

American students. *See* Nat'l Center for Educ. Statistics, U.S. Dept. of Educ., *Nat'l Assessment of Educ. Progress: The Nation's Report Card (Reading)* 5 (2005). Similarly, 39% of white 8th graders scored "proficient" or above on the math portion of the NAEP, while 9% of their African American counterparts did. *See* Nat'l Center for Educ. Statistics, U.S. Dept. of Educ., *Nat'l Assessment of Educ. Progress: The Nation's Report Card (Math)* 5 (2005). These disparities in student achievement ultimately translate into differences in economic well-being later in life and the ability of all citizens to participate fully in the portents of the American dream.[5]

B. Racially Isolated Schools Do Not Provide Equal Educational Opportunities.

1. Like the three branches of the federal government, many local school districts, including those now before the Court, have devoted themselves to closing the achievement gap by equalizing educational opportunities for students of all races. That goal, however, depends critically on the integration of public schools and, in particular, the elimination of racially isolated schools.

Racial isolation is a key reason behind the failure of the K-12 educational system to educate racial minorities to the same level as their white counterparts, and so long as it persists, so

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[5] Eliminating these disparities is even more critical now than it was when *Brown* was decided. In the 1950s, the link between educational and economic parity was modest; even the most equal of educational opportunities would not have translated into equality in the labor market. *See* Christopher Jencks & Meredith Phillips, The Black-White Test Score Gap, at 5-6 (Christopher Jencks & Meredith Phillips eds., Brookings Inst. Press 1998) (in 1953, black men with above-average achievement scores earned about 65% of what their white counterparts earned). Today, by contrast, educational and economic parity are inextricably linked, *id.* (in 1998, black men with above-average scores earned 96% of what their white counterparts earned), and the elimination of a racially identifiable academic achievement gap is crucial to achieving economic equality between blacks and whites, *id.* at 6.

too will the racial achievement gap.[6] As recent studies have demonstrated using large statewide and national databases, the degree of racial isolation in their school environments has a direct relationship to lower achievement among African-American students. *See, e.g.*, Geoffrey D. Borman & N. Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data* 40-42 (unpublished manuscript on file with the Council of the Great City Schools); Eric A. Hanushek et al., *New Evidence About* Brown v. Board of Education*: The Complex Effects of School Racial Composition on Achievement* 23-24 (Stanford Univ., Working Paper, Oct. 2004), *available at* http://edpro.stanford.edu/hanushek/admin/pages/files/uploads/race.pdf; *see also* Debra Viadero, *Fresh Look at Coleman Data Yields Different Results*, Ed. Week, June 21, 2006, at 21 (reporting on Borman & Dowling paper). Even after controlling for other factors such as family background, school, teacher, and peer effects, the percentage of African-American students in a school affects student achievement in a manner that is substantial, negative, and statistically significant. Borman & Dowling, *supra*, at 40-42; Hanushek, *supra*, at 23-24. Indeed, the racial composition of a student's school is approximately one and a half times more important

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[6] Despite *Brown* and the federal courts' decades-old commitment to desegregation, racial isolation is an ever-increasing reality for most public school students. Although the percentage of minority students is growing in the public school system as a whole, *see* Press Release, U.S. Census Bureau, *Nation's Population One-Third Minority* (May 10, 2006), public schools have become increasingly racially isolated throughout the nation, *see* Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, Harvard Civil Rights Project ("HCRP"), 4 (2006) (all Harvard-published reports cited herein are available at http://www.civilrightsproject.harvard.edu/research.php). While students across the country are experiencing increasing racial isolation, the statistics in some regions and states are particularly startling. For example, 87% of black students in California attend majority-minority schools. *Id.* at 25-26.

than that student's socioeconomic status for understanding educational outcomes. Borman & Dowling, *supra*, at 42.[7]

At least in part, this "achievement gap" derives from an inequality of educational resources: racially isolated minority schools do not have access to the same resources as other schools. Specifically, when it comes to what is widely acknowledged to be the single most important educational resource – teacher quality – majority-minority schools are at a distinct disadvantage. *See* Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 Economics of Educ. Rev. 377, 380-81 (2005). Teacher quality has a clear and measurable effect on student achievement. *See* Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 Econometrica 417, 434-35, 447-49 (2005). Yet it is well established that schools with large minority populations are more likely to be staffed by brand new teachers, and teachers with more experience and better education credentials are more likely to teach in schools with lower minority enrollments. The net result is that students in schools with high percentages of minority students have dramatically less qualified teachers. *See, e.g.*, Donald Boyd et al., *Explaining the Short Careers of High-Achieving*

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[7] This is not to suggest that schools with a high proportion of minorities are *inherently* inferior, or that African-American or other minority students are somehow unable to learn when schooled with each other. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 114, 119, 122 (1995) (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior . . . . [and that] any school that is black is inferior . . . . [B]lack schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement."). It is impossible to know exactly what the effect of racial isolation would be in the absence of such things as external racial prejudice and resource inequality. This brief, as it must, simply takes the reality of our contemporary culture and its historical context as it finds them, with external inequalities clearly having a real and negative effect on children attending racially isolated schools.

Teachers in Schools with Low-Performing Students, 95 Am. Econ. Rev. 166, 169-70 (2005); Clotfelter, *supra*, at 378-79 (concluding that the academic skills of the teachers themselves, as well as at least three years of experience, are the key predictors of teacher effectiveness).[8]

This link between racially isolated schools, inequitable resource allocation, and the racial achievement gap makes addressing racial isolation an interest of the most compelling order. Simply put, if school districts cannot take on racial isolation in their school systems, then they cannot provide the equal educational opportunities extolled by all three branches of the federal government. Indeed, absent the authority to address racial isolation – whether or not that isolation can be traced legally to prior de jure segregation – school districts cannot realize the ultimate goals of the No Child Left Behind Act. As discussed *infra*, the NCLBA is concerned centrally with eliminating the racial achievement gap in the nation's schools – which in turn, as shown above, is linked directly to the existence of racially isolated minority schools. To require that school districts progress toward elimination of the racial achievement gap while at the same time tying their hands as to development of locally-sensitive remedies puts districts in an untenable position, and dooms their efforts to failure.

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[8] Resources other than teacher quality are also impacted substantially by racial isolation. For example, racially isolated districts receive less funding than majority-white districts. *See, e.g.*, Council of the Great City Schools, *Adequate State Financing of Urban Schools: An Analysis of State Funding of the New York City Public Schools* 40-43 (2000), *available at* http://www.cgcs.org/pdfs/NYCAdequateFinanceReport.pdf; Council of the Great City Schools, *Adequate State Financing of Urban Schools: An Analysis of State Funding of the Philadelphia Public Schools* 30-33 (1998), *available at* http://www.cgcs.org/pdfs/PhiladelphiaAdequateReport.pdf. They also offer fewer Advanced Placement courses, a resource gap that in turn undermines equitable access to selective colleges and universities. *See, e.g.*, John T. Yun & Jose F. Moreno, *College Access, K-12 Concentrated Disadvantage, and the Next 25 Years of Education Research*, 35 Educ. Researcher 12, 15-16 (2006).

Similarly, this Court's hopes for *Grutter* turn critically on the ability of local districts to address the racial isolation that underlies the achievement gap. In *Grutter*, the Court made plain its wish that affirmative action in college admissions might soon be rendered obsolete. 539 U.S. at 346 ("As lower school education in minority communities improves, an increase in the number of [qualified minority] students may be anticipated. From today's vantage point, one may hope . . . that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."). But as long as the achievement gap remains, so too will the necessity of affirmative action admissions in higher education. *Grutter* cannot be "sunsetted" until the achievement gap is closed and more minority students are eligible for selective colleges without the need for affirmative action.

2. Even apart from the general proposition that educational parity depends on racial integration, this Court should independently recognize that the Seattle and Jefferson County School Boards have specifically identified integration as a compelling interest in their *own* communities. Local school districts, not federal courts, are best situated to determine the precise nexus between unequal resources, racial isolation, and minority achievement in their own communities, and to decide whether fostering racial integration is a necessary precondition to addressing both resource and achievement inequalities. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973) ("the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions"); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) ("[n]o single tradition in public

education is more deeply rooted than local control over the operation of schools").

It is not just that local school boards are more expert than federal judges in diagnosing the situation on the ground in their localities and devising effective remedies. They also are democratically accountable in a way that courts are not. As this Court has recognized, local control over educational policy ensures that "the school district and all state entities participating with it in operating the schools" can be "held accountable to the citizenry [and] to the political process." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *see also Milliken*, 418 U.S. at 742 (local control "affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence'" (quoting *Rodriguez*, 411 U.S. at 50)).

In fact, the experience of Jefferson County provides a perfect example of the benefits of local control extolled by this Court. From 1973 to 2000, while under a court-ordered desegregation plan, the Board "demonstrated extraordinary good faith through its dedication to quality education in an integrated setting." *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 841 n.9 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005) ("*JCPS*"). Throughout that time period, Jefferson County reevaluated and modified its student assignment plans "to maintain a fully integrated countywide system of schools" – all with advice from members of the community. *Id.* at 841-42.

Moreover, Jefferson County was keenly aware that its residents were likely to use the public schools (rather than opt out to private schools) – and thereby support the schools through taxes and other aid, both tangible and intangible – only if the Board continued with voluntary programs like the one at issue here even after unitary status was achieved in 2000. *JCPS*, 330 F. Supp. 2d at 834; *see also id.* at 855 (after

unitary status was achieved, there remained "strong public support for . . . an integrated school system" in Jefferson County); *id.* at 854 ("Every measure of *student and public attitudes* on the value of integration completely supports the conclusion that an integrated school system is an advantage for many parents and students [in Jefferson County]." (emphasis added)). Just as members of this Court have recognized, Jefferson County acted because it understood that "[t]he general quality of the schools . . . tends to decline when substantial elements of the community abandon them. The effects of resegregation can be even broader, reaching beyond the quality of education . . . to the life of the entire community." *Estes v. Metro. Branches of Dallas NAACP*, 444 U.S. 437, 451 (1980) (Powell, J., joined by Stewart and Rehnquist, JJ., dissenting from per curiam decision dismissing writs of certiorari as improvidently granted). Thus, over the past several decades, Jefferson County has illustrated perfectly the benefits of local control, carefully refining its student assignment plan to meet both legal mandates *and* the needs and interests of the community it serves.

C. Racially Integrated Schools Are Necessary To Fulfill The Essential Mission Of Public Schools.

This Court has long recognized that public schools are charged with more than teaching the core subjects of mathematics, language, and science. Public schools are also "the primary vehicle for transmitting the values on which our society rests," *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quotation omitted), and preparing students for "good citizenship" is central to the mission of the public school system, *Grutter*, 539 U.S. at 331 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

As our society becomes increasingly diverse, preparation for "good citizenship" increasingly requires that schools teach their students – "by example" as well as otherwise – to interact positively with individuals of different races. "One purpose of education is to prepare children for living in our society, which is a multi-racial society." *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1242 (9th Cir. 1979) (Kennedy, J., concurring). That crucial purpose can be fulfilled only by schools that are racially integrated, allowing children to interact with and learn from students of different races.

As this Court has long understood, racially diverse schools promote social cohesion, "preparing minority children for citizenship in our pluralistic society" and "teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473 (1982) (quotation omitted). That effect is achieved, in part, by the fact that racially integrated schools help to combat racial stereotypes and "promote[] cross-racial understanding." *Grutter*, 539 U.S. at 330 (quotation omitted). Learning in a diverse environment also provides both majority and minority students with "improved critical thinking skills – the ability to both understand and challenge views which are different from their own." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1174 (2005) (en banc) ("*PICS*"). As one of the courts below noted, even among those who oppose voluntary school integration, there is little dispute that "diversity encourages students not only to think critically but also democratically." *Id.* at 1175.

Moreover, the positive effects of a racially diverse K-12 educational environment last well beyond the schoolhouse door. In fact, exposure to racial diversity during the school-age years can break the cycle of racial segregation for all students – white and minority – in later life. Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and*

Educational Inequality, HCRP, 40-41 (2005). Alumni of racially diverse secondary schools, for instance, are more likely to attend diverse colleges, live in integrated neighborhoods, work in diverse firms, and have friends from another racial group. *See, e.g.*, Jomills Henry Braddock, II et al., *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, Phi Delta Kappan 259, 261 (1984); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 Ohio St. L.J. 733, 745 & n.74 (1998) (citing numerous other studies reaching same and similar conclusions and finding, *inter alia*, that desegregated classrooms increase interracial friendship). Both white and minority students in integrated school districts learn to work together in a way that makes them highly confident about their ability to work in racially integrated settings as adults. *See* Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, HCRP, 9-10 (2001).

These are precisely the beneficial effects of educational diversity that this Court found "compelling" in the university context. *See Grutter*, 539 U.S. at 330 (noting law school's admissions policy promotes "cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races" (quotation omitted) (alteration in original)). As the Court concluded in *Grutter*, there is ample social-science data to support the proposition that educational diversity "promotes learning outcomes and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* at 330 (quoting amici); *see also id.* at 330-31 ("the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints") (citing briefs of leading American business and military leaders).

The interest that the Court deemed compelling in *Grutter* is even more so at the elementary and secondary education level. First, as compared to the elite higher education institutions considered in *Grutter*, attended by a relatively small number of students, public schools shape the lives of the vast majority of American children. These public schools are responsible for preparing an entire generation of children "for work and citizenship," as well as for "sustaining our political and cultural heritage." *Id.* at 331. Second, students at the K-12 level are more impressionable than college and graduate students, and thus more amenable to the benefits of a diverse classroom environment. Indeed, the earlier that students experience desegregated learning environments, the greater the positive impact. *See* Orfield & Lee, *Why Segregation Matters*, *supra*, at 42. In short, it would make no sense to allow selective colleges and universities to provide the benefits of a diverse post-secondary education to their students while prohibiting the public schools that serve a far larger population from providing the even greater benefits of elementary and secondary school diversity to their students. *See PICS*, 426 F.3d at 1176 ("it would be a perverse reading of the Equal Protection Clause that would allow a university, educating a relatively small percentage of the population, to use race when choosing its student body but not allow a public school district, educating all children attending its schools, to consider a student's race").

II. USING RACE AS ONE FACTOR IN SCHOOL ASSIGNMENTS IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING INTEREST IN RACIALLY INTEGRATED SCHOOLS.

A. A Student Assignment Plan May Properly Take Account Of Race To Further A Compelling Interest In Racially Integrated Schools.

Once the compelling interest is properly understood as requiring, by definition, *racial* integration – or the absence of

racial isolation – then it is clear that considering race but not other personal factors is narrowly tailored to achieving the identified interest. Because the goal is explicitly racial in nature, there is no need to look – indeed, no sense in looking – at "holistic" aspects of each student in making school assignments. *See Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) ("If reducing racial isolation is standing alone a constitutionally permissible goal . . . , then there is no more effective means of achieving that goal than to base decisions on race."); *PICS*, 426 F.3d at 1191 ("The logic is self-evident: When racial diversity is a principal element of the school district's compelling interest, then a narrowly tailored plan may explicitly take race into account."). Petitioners disagree, asserting that this Court's precedents require any race-conscious assignment plan to evaluate each student on the basis of some holistic concept of diversity. But "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause," *Grutter*, 539 U.S. at 327, and in the context of K-12 student assignment plans, the notion of "holistic diversity" is misplaced.

First, to import that requirement into this case would be to uncouple the narrow-tailoring analysis from the identified interest. In *Grutter*, the requirement of "individualized holistic review" was relevant to the law school's interest in "'the robust exchange of ideas' fostered by viewpoint diversity." *PICS*, 426 F.3d at 1183 (quoting *Grutter*, 539 U.S. at 324). But here, where the compelling interest is in racial integration, "the only relevant criterion, . . . is a student's race; individualized consideration beyond that is irrelevant to the compelling interest." *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005). Other categories of student characteristics – varying socio-economic backgrounds, interests, talents or life experiences – are simply immaterial to the school districts' interest. *See PICS*, 426 F.3d at 1183 ("Because race itself is the relevant consideration when

attempting to ameliorate de facto segregation, the District's tiebreaker must necessarily focus on the race of its students.").

Second, a requirement that the evaluation of each student applicant include holistic, individualized review may make sense in the context of competitive admissions to institutions of higher education, but it is out of place in addressing K-12 student assignment plans. As the Ninth Circuit explained, "[s]tudents' relative qualifications are irrelevant because regardless of their academic achievement, sports or artistic ability, musical talent or life experience, any student who wants to attend Seattle's public high schools is entitled to an assignment; no assignment to any of the District's high schools is tethered to a student's qualifications." *Id.* at 1181. As a result, "no stigma results from any particular school assignment," and "the dangers that are present in the university context – of substituting racial preference for qualification-based competition – are absent here." *Id*; *see also id.* at 1194 (Kozinski, J., concurring) ("That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability."). In short, the reasons for requiring individualized review in the university setting are absent in the context of K-12 student assignment plans.

Third, the holistic concept of diversity is ill-suited to elementary and secondary schoolchildren. While it is possible to evaluate comprehensively the potential diversity contributions of a law school applicant, who has had decades to accumulate interests, talents, experiences or achievements that may distinguish him or her from another candidate, the value and the practicality of such an inquiry becomes tenuous – even bordering on absurd – as the context shifts to younger and younger students.

It is exceedingly difficult to imagine how (or why) one would subject the youngest children, who are only four or five years old, to an evaluation of their potential contribution to a

broader diversity not even sought here. The type of talent- and experience-based diversity that makes an exceptional class of law students is not one that could or should be replicated in a public elementary school classroom. Nor has anyone asserted that it would be of any value in the K-12 context at issue in these cases. If anything, transforming what is now a stigma-free school assignment process into one that turns on a thorough-going evaluation of everything a five-year-old can bring to a classroom would be entirely contrary to pedagogical goals. Today's children enjoy plenty of opportunities to be critically evaluated and compared to their peers; there is no need to turn public grade-school assignment into a miniature version of elite law-school admissions.

B. School Districts Consider Race As Only One Of Many Factors In School Assignments.

Neither the school districts before the Court nor any other district of which amici are aware relies exclusively on race-conscious student assignment plans to achieve the goal of racially integrated schools. To the contrary, local school districts use race, if at all, only in conjunction with other factors in making school assignments – and those assignments, in turn, are used in conjunction with still other race-neutral methods of desegregating or maintaining desegregated schools. In short, race is not the only or even the predominant factor at play. *Cf. Miller v. Johnson*, 515 U.S. 900, 920 (1995) (because race was "the predominant, overriding factor" in districting, legislation held to strict scrutiny and ruled invalid).

Typically, where race is used as part of a student assignment plan, it is but one of a multitude of factors. In Jefferson County, for instance, "[p]rior to any consideration of a student's race, a myriad of other factors, such as place of residence, school capacity, program popularity, random draw and the nature of the student's choices, will have a more significant effect on school assignment." *JCPS*, 330 F. Supp.

2d at 842. *See also PICS*, 426 F.3d at 1169-71 (Seattle plan provides for consideration of student choice, sibling attendance, distance, and lottery in addition to race). This should not be surprising. As discussed above, *supra* at 12-14, one of the virtues of leaving educational policy judgments in the hands of local school districts is that school boards and other local decisionmakers are democratically accountable entities, required to balance the pursuit of racial integration with other goals important to their communities – like the desire of parents to send their children to neighborhood schools, or to school with their siblings.

Moreover, many school districts employ other, race-neutral means of integrating schools at the same time that they consider race as one factor in school assignments. Both Jefferson County and Seattle, for instance, feature magnet schools and magnet programs designed in part to attract racially diverse student bodies. *PICS*, 426 F.3d at 1191; *JCPS*, 330 F. Supp. 2d at 842. Allowing school choice, as Jefferson County, Seattle, and many other districts do, itself permits a measure of racial integration that otherwise would not be possible in residentially segregated neighborhoods. Finally, many districts – including those before the Court here – are engaged in significant efforts to improve schools across the board, which has the salutary effect of equalizing educational opportunities for everyone. *See PICS*, 426 F.3d at 1169 ("the District implemented the Plan as part of a comprehensive effort to improve and equalize the attractiveness of all the high schools"); *JCPS*, 330 F. Supp. 2d at 840 (JCPS offers "a full array of comprehensive, specialized and advanced programs throughout its schools").

Educational policy is not a one-size-fits-all proposition. Local school boards must have the flexibility to experiment with various means of advancing the compelling interest in racial integration – including, where they believe it necessary, modestly race-conscious assignment policies used as part of

larger programs to ensure that their schools become (or remain) integrated. Race, in other words, must be one of the tools available to localities as they seek to advance a race-specific goal.

Deference to the judgments of local school districts on this count is necessary both to "allow[] citizens to participate in decisionmaking" and to "allow[] innovation so that school programs can fit local needs." *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991). Local efforts to devise solutions to local segregation problems are consistent with this Court's repeated admonitions that it is "the duty of the State and its subdivisions" – not the courts – to ensure that public schools are not shaped by "new and subtle forms" of racial prejudice. *See Pitts*, 503 U.S. at 490 ("[I]t must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility."). As Judge Kozinski explained in his concurrence below, the school assignment plans at issue are "local experiment[s], pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent." *PICS*, 426 F.3d at 1196 (quoting *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring)). In such a case, it is better to "leave the decision to those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable." *Id.*

C. Race-Neutral Alternatives Are Insufficient To Achieve The Compelling Interest In Racial Integration.

1. Petitioners and their amici assert that race-neutral measures are adequate to achieve the goals pursued by the school districts here, but that claim is unsupportable. First, as

just explained, it is illogical to require use of race-neutral methods when the compelling interest identified has an explicitly racial component. If the very goal of the student assignment plans is to achieve racial integration (or to avoid segregation and resegregation), then a narrowly-tailored program need not turn a blind eye to race.

Moreover, it is disingenuous to suggest using socio-economic status or other measures as a proxy for race. If it is impermissible to consider race openly, then there is no reason to believe that a surrogate purposefully designed to take account of race through the backdoor would be any less objectionable. *See Gratz v. Bollinger*, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."); *PICS*, 426 F.3d at 1189 ("We do not require the District to conceal its compelling interest of achieving racial diversity and avoiding racial concentration or isolation through the use of 'some clumsier proxy device' such as poverty." (quoting *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring))).

2. Even if it made sense to require school districts to use race-neutral means to achieve race-conscious ends, the research amply supports the conclusion that race-neutral methods alone are not equal to the task of integrating the schools. It is important to remember that school districts are not charged with considering every possible alternative – no matter how impractical or unlikely to succeed – to their race-conscious assignment plans. This Court has only required consideration of "*workable* race-neutral alternatives *that will achieve the diversity*" sought. *Grutter*, 539 U.S. at 339 (emphasis added); *see also Comfort*, 418 F.3d at 23 (district "need not prove the impracticability of every conceivable model for racial integration"). Accordingly, the school districts here need only consider alternatives that would

actually achieve their stated goals of promoting racial integration and avoiding racial isolation in their schools.

Some have suggested that socio-economic status could be used instead of race to achieve the same goals, but the research does not support this assertion. The best evidence on this subject comes from a recent study – specifically designed to explore "the extent to which race-neutral income-based integration plans would produce ancillary integration" – that concluded that "income and race cannot stand as proxies for one another in school integration policies." Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 Educ. Eval. & Pol'y Analysis 49, 68 (2006). The study attempted to quantify the levels of racial school integration that are both possible in theory and probable under a variety of income-integration policies and income distributions. *Id.* at 57. An exhaustive analysis demonstrated that "under conditions typical of large school districts in the United States and under practical income-desegregation policies, achieving income desegregation *guarantees little to no racial integration.*" *Id.* at 63 (emphasis added). Racial desegregation is particularly unlikely to occur in school districts, like Seattle and many other large urban school districts, with high levels of residential racial segregation. *Id.* Furthermore, the greatest levels of racial integration are likely to occur in school districts that do not have high levels of residential segregation and are not operating under a racial desegregation plan. *Id.* at 66. "But such districts tend to have low levels of school racial segregation in the first place, so the ancillary racial integration benefits of an income-integration policy are likely to accrue primarily where least needed." *Id.* In sum, the "analysis show[ed] that even under the most stringent [and impractical] form of income-based integration – school assignment based on exact family income levels – and assuming that income balance is achieved completely, income integration does not

guarantee even a modest level of racial desegregation." *Id.* at 67. Plainly, consideration of socio-economic status does not provide a workable race-neutral alternative.

The fact that many school districts have experienced significant resegregation upon a return to race-neutral methods further demonstrates that their judgments regarding the insufficiency of race-neutral alternatives are well-founded. For instance, the Charlotte-Mecklenburg school district that was the subject of the *Swann* litigation was declared unitary (over the board's objections) in 1999, and the district court enjoined the school board from continuing to use any race-conscious student assignment policies.[9] In 2000, the school board adopted a race-neutral student assignment plan emphasizing parental choice, effective for the 2002-2003 school year, that resulted in major resegregation in Charlotte schools. Orfield & Lee, *Racial Transformation*, *supra*, at 33-34 ("After the county school board's long and costly struggle to continue its desegregation plan was rejected by the federal courts, the county has experienced enormous increases in segregation," despite having seen a "major decline in residential segregation during the period of school desegregation"); Thomas J. Kane et al., *School Quality, Neighborhoods, and Housing Prices*, 8 Am. Law & Econ. Rev. 183, 209-10 (2006). *Cf. Belk*, 269 F.3d at 385 ("The trend in CMS toward resegregation of its schools has accelerated markedly since the move to de-emphasize satellite zones and mandatory busing in 1992.").

Similarly, the San Francisco school district experienced a sharp increase in racial segregation when it moved from a

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[9] The Fourth Circuit decision affirming the finding of unitary status vacated the injunctive portion of the district court order because it was "unsettled whether diversity may be a compelling state interest" and there was no evidence regarding any assignment plan the district might adopt. *Belk v. Charlotte-Mecklenberg Bd. of Educ.*, 269 F.3d 305, 347 (4th Cir. 2001).

race-conscious student assignment plan to a race-neutral "diversity index." *See S.F. NAACP v. S.F. Unified Sch. Dist.*, 413 F. Supp. 2d 1051 (N.D. Cal. 2005). The district court there terminated the consent decree after finding that the race-neutral plan "has in fact allowed, if not caused, resegregation of the school district." *Id.* at 1071. Like Charlotte and San Francisco, DeKalb County (subject of the *Pitts* case), Denver (subject of *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973)), Kansas City (subject of the *Jenkins* case), and Oklahoma City (subject of the *Dowell* case) have seen sharp resegregation of their schools following court orders terminating desegregation orders. Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or* Plessy*'s Nightmare?*, HCRP, 38 (2004) (following declaration of unitary status, by 2001, black student exposure to white students fell 72% in DeKalb County, 15% in Denver, 14% in Kansas City, and 12% in Oklahoma City).[10]

The amicus brief of Florida Governor Jeb Bush and the State Board of Education suggests that Florida's race-neutral education programs provide a "better" model for school districts throughout the nation. (Florida Br. 26.) Amici fail to note, however, that despite early progress, Florida schools today are significantly segregated. *See* Kathryn M. Borman et

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[10] The experiences of these districts are not unique; there is a well-documented trend towards resegregation in our nation's schools. *See* Orfield & Lee, *Racial Transformation, supra*, at 31 ("[M]any school districts have ended their plans and restored neighborhood schools with segregation reflecting or even intensifying the residential segregation."); *id.* at 37 ("Every measure of segregation since the late 1980s has shown growing separation."); Erika Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, HCRP, 4 (2002) ("The racial trend in the school districts studied is substantial and clear: *virtually all* school districts analyzed are showing lower levels of inter-racial exposure since 1986, suggesting a trend toward resegregation, and in some districts, these declines are sharp."); Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, HCRP, 48 (2001).

al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 Am. Educ. Research. J. 605, 614 (2004). Even if the Florida plan has had some positive educational benefit, there is every indication that it would be *more* effective, even on its own terms, if it addressed the significant racial segregation in Florida schools. The Borman study – which directly assessed "whether school-level variation in racial segregation is associated with school-level performance" on Florida's standardized test (the "FCAT") – concluded that students in racially isolated minority schools scored lower on the FCAT. *Id.* at 614, 626 ("the racial balance (or imbalance) of schools is associated with significantly lower percentages of students passing the FCAT reading and math tests at the elementary and high school levels"). As the study concluded:

> Controlling for other known and argued predictors of school-level standardized test performance, including per-pupil expenditures and percentage poverty, our analyses revealed that race still matters: Both the racial composition of a school and whether a school was Black segregated (relative to the school district's racial composition) predicted the percentage of students passing the FCAT. . . . Furthermore, our analyses suggest that *policies that attempt to resolve the achievement gap by funding equity or classroom size changes may not be successful if they do not accept the premise of* Brown – *that integration is fundamental to ensuring educational quality.*

Id. at 626-27 (emphasis added). Thus, the Florida plan only confirms that race-neutral methods are insufficient to attain the goals of the respondent school districts.

3. In light of the significant evidence that race-neutral measures alone are insufficient, the tradition of local control and accountability in public education suggests that school districts are owed a measure of deference in choosing the

means to address the problem of racial isolation in their localities. This is particularly so in view of the legal minefield in which many school districts must operate. All too frequently, school districts find themselves on the horns of a dilemma, facing costly actual or threatened litigation no matter which way they turn – accused of doing too little to combat segregation and equalize educational opportunity for all students, or faulted for trying to do too much. "Too often nowadays, an election or a vote is a mere precursor to litigation, with the outcome of the dispute not known until judges decide the case many years later." *PICS*, 426 F.3d at 1195 (Kozinski, J., concurring).

Experience bears out Judge Kozinski's observation. Some school districts adopted voluntary race-conscious assignment plans in order to head off legal action based on the segregation in their schools. In the late 1970's, for instance, local groups filed a complaint with the Department of Education's Office of Civil Rights and threatened further legal action against the Seattle school district "if the District failed to adopt a mandatory desegregation plan." *Id.* at 1167. The Seattle plan at issue here grew out of the district's earlier efforts to avoid litigation and a government investigation. Ironically, this litigation might have been avoided had the district refused to adopt voluntary measures then, and instead waited for legal action and a court order.[11]

Other school districts find themselves freed from a desegregation order only to watch helplessly as their schools

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[11] Under the petitioners' view of these cases – that racial integration cannot be undertaken voluntarily – a school district facing the threat of a lawsuit has no option other than litigation, even when it might *agree* with the prospective plaintiffs' claim that an integration plan is constitutionally mandated. Essentially, school districts are forbidden from operating racial integration programs without judicial interference, a result that flies in the face of this Court's mandate that federal court involvement is generally inferior to local control of schools. *See Pitts*, 503 U.S. at 489-90.

resegregate and another lawsuit comes along. The Charlotte-Mecklenburg school district again provides an apt case in point. Following adoption of a race-neutral student assignment plan emphasizing parental choice, Charlotte experienced significant resegregation. *See supra* at 25. Today, the district once again finds itself in litigation, defending claims that it is failing to provide the "sound basic education" guaranteed under state law because the new plan has created high poverty, low income schools marked by, among other things, "racial minority status" and "racial isolation." Second Am. Compl. ¶¶ 6, 32, *available at* http://www.law.unc.edu/PDFS/2ndamendedcomplaint.pdf. *Cf. Belk*, 269 F.3d at 385.

Still other school districts, like Jefferson County, continued to voluntarily operate integration plans following declaration of unitary status in an attempt to maintain the integration they worked so hard to achieve. Often, it was these very efforts that convinced the district courts to relinquish jurisdiction, as they demonstrated the "good faith" commitment to desegregation required by this Court's precedents. *See, e.g.*, *Dowell v. Board of Educ.*, 8 F.3d 1501, 1513 (10th Cir. 1993) (in determining good faith, "we look to future-oriented board policies manifesting a continuing commitment to desegregation"); *Brown v. Bd. of Educ.*, 978 F.2d 585, 592 (10th Cir. 1992) ("[T]he possibility of immediate resegregation following a declaration of unitariness seems all too real. For this reason, we are convinced that evaluation of the 'good faith' prong of the *Dowell* test must include consideration of a school system's continued commitment to integration. A school system that views compliance with a school desegregation plan as a means by which to return to student assignment practices that produce numerous racially identifiable schools cannot be said to be acting in 'good faith.'"); *Spangler*, 611 F.2d at 1241. Petitioners' argument, however, would create a truly bizarre

twist in that the good-faith commitment to desegregation that is applauded – indeed, demanded – by the courts one day, would be transformed into a constitutional violation the day after unitary status is declared. *See JCPS*, 330 F. Supp. 2d at 851 ("It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law.").[12]

In the face of these enduring problems and a lack of workable, race-neutral alternatives, local school officials need some leeway to perform their duties in a manner that best serves their local needs. Their reasoned judgments that limited race-conscious measures are vital to attain the compelling interest in racial integration should not be disturbed.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

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[12] Indeed, if school districts cannot maintain integration through race-conscious student assignment plans once an order has been lifted, then district courts may be reluctant to relinquish jurisdiction in the first place. The result will be even more prolonged supervision by federal district courts, contrary to the tradition of vesting education policy decisions with politically accountable school boards. *Cf. PICS*, 426 F.3d at 1195 (Kozinski, J., concurring) (lamenting frequent "resort to the courts" that "often delays implementation of a program for years," and noting that "there is much to be said for returning primacy on matters of educational policy to local officials").

Respectfully submitted,

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APPENDIX

INTEREST OF AMICI CURIAE

The Council of the Great City Schools ("Council"), the only national organization representing the needs of America's urban public schools, is a coalition of 66 of the nation's largest urban public school systems – including the two now before the Court – educating some 7.5 million students.[1] Founded in 1956 and incorporated in 1961, the

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[1] Member school districts include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, East Baton Rouge Parish Schools, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public Schools, Palm Beach County Public Schools, Philadelphia Public Schools, Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St. Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Wichita Public Schools.

Council is located in Washington D.C., where it works to promote urban education through legislation, research, technical assistance in instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share promising practices and address common concerns. The Great City Schools represents 15.5% of total national public school enrollment. Nearly two-thirds of our students are eligible for a free-lunch subsidy, compared to just over one-third nationally. In addition, more than three-quarters of Great City Schools' students are from minority backgrounds, primarily African American, Hispanic, or Asian American,[2] compared with the 40.5% national average. Many Council districts have obtained unitary status over the past decade. Council districts are committed to integration of their student bodies and providing equal educational opportunities, while fostering the educational benefits of racial and ethnic diversity.

The Council was one of the first national education organizations that supported the No Child Left Behind Act, and continues to do so. The Council agrees with the main goals of No Child Left Behind, including accountability, closing the achievement gaps between minority and non-minority students, and focusing on the needs of poor and minority students, students with disabilities, and English language learners.

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The Magnet Schools of America ("MSA") is a national educational association located in Washington, D.C. and has been in existence since the 1970s. The organization promotes magnet schools through desegregation, equity, and excellence; through the expansion and improvement of

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[2] Of the approximately 7.5 million students enrolled in the Council's members' schools, 38% are African American, 33% are Hispanic, 22% are White, 6% are Asian/Pacific Islander.

magnet, theme, and public choice schools. The Association encourages passage of national and state legislation promoting school desegregation, theme-based/specialty education, and public schools of choice. MSA supports and serves the leaders and teachers of magnet and/or specialized schools, while promoting the development of new magnet and public schools of choice. MSA's professional development for teachers and administrators provides a forum for leadership, school reform, and innovation in public education. Its members, approximately 2,000 individuals and schools across the United States, implement programs to reduce, eliminate, or prevent minority group isolation in its programs and schools. MSA has provided for many years, and continues to provide, technical assistance to the majority of the magnet schools grantees that have been aided by the federal Magnet Schools Assistance Program (MSAP) since its inception in 1984. MSAP was initiated to provide federal support for magnet schools that were part of an approved voluntary or court-ordered desegregation plan. MSAP is the *only* federal program solely addressing desegregation and diversity in public elementary and secondary schools. It has provided the impetus for thousands of magnet schools to be developed with diverse school enrollments. The MSAP federally funded magnet schools have been and continue to be required to develop and implement voluntary desegregation plans, unless they continue to be part of a court order, to reduce racial isolation in our nation.

* * *

The Public Education Network ("PEN") is a national organization of local education funds ("LEFs") and individuals working to build public demand and mobilize resources for quality public education in low-income communities across the nation. PEN believes that public education is the cornerstone of our democratic way of life. PEN represents 78 LEFs working in 34 states and the District

of Columbia on behalf of 11 million children attending 16,000 schools in 1600 school districts in the U.S. On average, 57% of children in LEF communities are poor and minority. PEN seeks to bring the community voice into the debate on quality public education in the firm belief that an active, vocal constituency is necessary to ensure every child, in every community, a quality public education.

* * *

The United States Conference of Mayors ("Conference") is the official national organization of urban mayors representing cities that have populations of 30,000 or more; have been in existence since 1932; and have mayors as their chief locally elected official. One of the primary roles of the Conference is to ensure that federal policy meets urban needs. The Conference, through its stated policies, is committed to ensuring diversity and equity in housing, employment and education in our cities; providing high quality and equal opportunity for all of the nation's children; improving our nation's schools to foster greater student achievement; linking education with related social and human services so children are ready for school; supporting and encouraging the development of a framework for 21st century education; securing and preparing the American workforce of today and tomorrow on the global stage; and ensuring a local leadership role for mayors in establishing policies, programs and practices to better prepare students to succeed as citizens and workers in our cities for the 21st century.

* * *

The San Francisco Unified School District ("SFUSD"), founded in 1851, is the first public school district established in California. One of the largest school districts in the state, SFUSD educates more than 57,000 students annually in more than 160 pre-kindergarten through 12th grade schools. SFUSD is joining this amicus brief, in addition to its membership in the Council of the Great City Schools, because

of its unique experience with the issue of segregation. From 1983 through December 31, 2005, SFUSD was under a federal Consent Decree designed to eliminate the vestiges of de jure segregation throughout SFUSD. *San Francisco NAACP v. SFUSD*, 576 F. Supp. 34 (N.D. Cal. 1983).[3] For the first sixteen years of the Consent Decree, SFUSD successfully eliminated racial identifiability in its schools, classrooms and programs by relying on a plan that allowed for the use of race in student assignment.[4]

In 1999, following a separate class action suit that was subsequently related to the ongoing desegregation case, *Ho v. SFUSD*, Case No. C-94-2418 WHO (N.D. Cal. 1994),[5] the parties to the Consent Decree reached a settlement, which the Court approved. That settlement eliminated the racial balance requirements of the Consent Decree and set a termination date for the Consent Decree of December 31, 2002. *San Francisco NAACP v. SFUSD*, 59 F. Supp. 2d 1021, 1039 (N.D. Cal. 1999). In 2001, the parties to the Consent Decree reached another settlement, which the Court also approved, extending the Consent Decree to December 31, 2005. Since the 1999 settlement and through the end of the Consent Decree in 2005, SFUSD used various race-neutral student assignment strategies to avoid racial identifiability in its schools, classrooms and programs, including relying on multiple race-neutral characteristics such as a student's socioeconomic status. Despite its best efforts, however, SFUSD has not been successful in avoiding racial identifiability since it stopped

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[3] This was a class action suit filed on behalf of all children eligible to attend SFUSD schools.

[4] The plan required that none of nine specific racial/ethnic groups constitute more than 45% of the enrollment at a regular school or more than 40% of enrollment at an alternative school and that at least four of those specific groups be represented at each school.

[5] This class action was filed on behalf of students of Chinese American descent, who claimed that the use of race under the student assignment plan constituted racial discrimination in violation of the Equal Protection Clause.

using race in student assignment. Even though SFUSD is racially and culturally diverse,[6] since the implementation of the race-neutral student assignment plans that followed the 1999 and 2001 settlements, SFUSD's schools have severely resegregated. By the end of the Consent Decree, the number of schools resegregated (60% or higher of one race) at one or more grade levels had reached approximately fifty schools. That number was 43 schools in the 2004-05 school year and thirty in the 2001-02 school year.

Based on its own unique experience, knowing first-hand that the use of race-neutral student assignment methods has led to severe resegregation in its schools, classrooms, and programs, SFUSD respectfully submits that the use of race in student assignment is necessary to avoid racial segregation.

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[6] SFUSD's student body is broken down as follows: approximately 32.2% Chinese, 22% Latino, 13.2% African American, 9.3% non-Hispanic white, with the remaining percentages comprising Filipino, Japanese, Korean, Native American, and other non-white students.